

## Internal Revenue Service

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Department of the Treasury  
Washington, DC 20224

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Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:FIP:B02  
PLR-118571-09

Date:  
May 26, 2009

In Re:

### Legend:

Fund =

Trust =

Subsidiary =

Type A Company =

State =

Country =

Dear :

This responds to your letter dated April 3, 2009, submitted by your authorized representative on behalf of Fund. Fund requests that the Internal Revenue Service rule that income derived from its investments in a wholly-owned subsidiary that is a controlled foreign corporation (CFC) constitutes qualifying income under § 851(b)(2) of the Internal Revenue Code of 1986, as amended (the Code).

### Facts:

Fund is a newly formed series of Trust, which is a State business trust. Trust is registered as an open-end series management investment company under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the 1940 Act). Fund is an accrual method taxpayer, classified as a corporation for federal income tax

purposes. Fund uses a fiscal year ending October 31 as its taxable year. Fund intends to elect and qualify to be taxed as a regulated investment company (RIC) under § 851(a) of the Code.

Fund has formed Subsidiary, a wholly-owned subsidiary incorporated as a Type A Company under the laws of Country. Under the laws of Country, a Type A Company provides limited liability for all holders of shares. A shareholder's liability is limited to the amount, if any, unpaid with respect to the shares acquired by the shareholder. Fund represents that Subsidiary will be treated as a corporation for federal income tax purposes under default entity classification rules, and intends to ensure such classification by filing a protective election on Form 8832, Entity Classification Election.

Fund represents that, although Subsidiary will not be registered as an investment company under the 1940 Act, Subsidiary will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to transactions in commodity index swap agreements and other transactions in derivatives.

Fund may invest up to twenty-five percent of its assets in Subsidiary, subject to the limitations set forth in § 851(b)(3) of the Code. Subsidiary may invest without limitation in commodities, commodity-linked derivatives and other securities, such as exchange-traded notes, that may provide leveraged and non-leveraged exposure to commodity markets. Subsidiary also may hold cash and invest in cash equivalent instruments, including affiliated money market funds, some of which may serve as margin or collateral for Subsidiary's derivative positions.

Subsidiary will be wholly-owned by Fund, and is thus expected to be classified as a CFC, as defined in § 957 of the Code. Fund will include its "Subpart F" income attributable to Subsidiary under the rules in the Code applicable to CFCs.

### **Law and Analysis:**

Section 851(b)(2) of the Code provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the Qualifying Income Requirement). Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. Section 851(b)(2) defines qualifying income, in relevant part, as –

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC's] business of investing in such stock, securities, or currencies . . . .

Section 2(a)(36) of the 1940 Act defines the term “security” as –

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

In addition, § 851(b) of the Code provides that, for purposes of § 851(b)(2), there shall be treated as dividends amounts included in gross income under §§ 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under §§ 959(a)(1) or 1293(c) (as the case may be), there are distributions out of the earnings and profits of the taxable year which are attributable to the amounts so included.

Section 957 of the Code defines a controlled foreign corporation (CFC) as any foreign corporation in which more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the stock is owned by United States shareholders on any day during the corporation’s taxable year. A United States shareholder is defined in § 951(b) as a United States person who owns 10 percent or more of the total voting power of a foreign corporation. Fund represents that it will own 100 percent of the voting power of the stock of Subsidiary. Fund is a United States person. Fund therefore represents that Subsidiary will qualify as a CFC under these provisions.

Section 951(a)(1) of the Code provides that, if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during any taxable year, every person who is a United States shareholder of this corporation and who owns stock in this corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the sum of the shareholder’s pro rata share of the CFC’s subpart F income for the taxable year.

Section 952 of the Code defines subpart F income to include foreign base company income determined under § 954. Under § 954(a)(1), foreign base company income includes foreign personal holding company income determined under § 954(c).

Section 954(c)(1)(A) defines foreign personal holding company income to include dividends, interest, royalties, rents, and annuities.

Subsidiary's income from its investments in commodities and commodity-linked instruments may generate subpart F income. Fund therefore represents that it will include in income Subsidiary's subpart F income for the taxable year in accordance with § 951.

**Conclusion:**

Based on the facts as represented, we rule that subpart F income of the Subsidiary attributable to Fund is income derived with respect to Fund's business of investing in the stock of Subsidiary and thus constitutes qualifying income under § 851(b)(2) of the Code.

This ruling is directed only to the taxpayer who requested it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) provides that this letter may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Thomas M. Preston  
Thomas M. Preston  
Senior Counsel, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions & Products)